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IN THE  
SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1982

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BROOKSIDE LIMITED PARTNERSHIP,

Petitioner,

vs.

THE UNITED STATES,

Defendant.

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ON PETITION FOR A WRIT OF CERTIORARI  
UNITED STATES COURT OF CLAIMS

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PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is there an unstated exception to the law of contracts which provides that HUD need not be treated as a contracting party and bound by the conditions of contracts into which it has entered with private parties?

2. Has the concept of "arbitrary and capricious" entered somehow into the concept of HUD's contractual responsibilities so that no contract will ever be interpreted contrary to the interest of HUD unless HUD's interpretation of the contract is so egregious as to be thought to be arbitrary and capricious?

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Reference to Reports of Opinions

Delivered in the Courts Below

The opinion of the Court below filed September 3, 1982, and not yet reported is reprinted in the Appendix hereto.

Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C.A. § 1255, from an Order and Judgment entered September 3, 1982. This is a case in the Court of Claims that may be reviewed by the Supreme Court by Writ of Certiorari granted on Petition of the claimant.

Statutory Provisions Involved

12 U.S.C.A. § 1715 (b).

(b) The secretary is authorized, upon application by the mortgagee, to insured under this section as hereinafter provided in a mortgage... which is eligible for insurance as provided

herein and, upon such terms and conditions as the secretary may prescribe, to make commitments for the insurance of such mortgages prior to the date of their execution or dispersment thereon.

### Statement of the Case

This is an action brought by an owner-developer-mortgagor of a federally unsubsidized section 221 (d) (4), multi-family project based on the defendant's breach of an implied-in-fact covenant. For convenience, owner-developer-mortgagor is designated hereinafter as O-D-M.

An existing contractual relationship between HUD and the O-D-M was found by the Court below.

Such a contractual relationship is authorized by statute, 12 USC 1715. Therein, the Secretary is authorized to insure a mortgage eligible for insurance and to make commitments for insurance of such

mortgages under such terms and conditions as the Secretary may prescribe.

The O-D-M contends that an implied-in-fact covenant of the contractual relationship is that HUD was to conduct inspection of construction for the benefit and protection of the O-D-M for which payment of \$13,670.00 was specifically required. The O-D-M asserts that HUD breached its covenant of inspection for which the O-D-M paid \$13,670.00.

There is more than one document that contributes to the contractual relationship between HUD and O-D-M. However, nowhere among them is there a document signed by HUD and O-D-M describing the inspection

responsibilities of HUD to O-D-M or the amount of money to be paid for them by O-D-M. It is acknowledged that HUD did make inspections of construction and that O-D-M did pay to HUD \$13,670.00 for the inspections. It is not disputed that with each inspection of construction by HUD, HUD demanded and received a portion of the \$13,670.00.

On a printed form supplied by HUD with the blanks and filed according to HUD's direction, the construction contractor, one Monal Construction Company and L-B Building Co., a joint venture, gave authority to HUD to enter on to the construction site and to interpret Contract Documents and to determine



construction compliance therewith.  
This form signed by the construction contractor and O-D-M became the construction agreement and was entitled by HUD: CONSTRUCTION CONTRACT - COST PLUS.

This same form, known as FHA Form No. 2442A also, required the construction contractor to give to HUD the right to have payments made or payments withheld according to whether work was acceptably completed as determined by HUD's inspection of construction.

The two provisions of the CONSTRUCTION CONTRACT - COST PLUS referred to above are:

## Article 8 - Right of Entry and Interpretation

A. The Lender and its agents or assigns and the Commissioner and his agents shall, at all times during construction, have the right of entry and free access to the project and the right to inspect all work done and materials, equipment and fixtures, furnished, installed or stored in and about the project. For such purpose, the Contractor shall furnish each enclosed working space as the Lender or Commissioner may require and find acceptable as to location, size, accommodations and furnishings.

B. The Commissioner shall also have the right to interpret the Contract Documents and to determine compliance therewith.

and,

## Article 3 - Payments

B. Each month after the commencement of work hereunder, the Contractor shall make a monthly request for payment (in quadruplicate on FHA Form No. 2448) by the Owner for work done during the preceding month. Each request for payment shall be filed at least ten (10) days before the date payment is desired. Subject to the approval of the Lender and the Commissioner, the Contractor shall be entitled to payment thereon in an amount equal

to (1) the total value of classes of the work acceptably completed; plus (2) the value of materials and equipment not incorporated in the work, but delivered to and suitably stored at the site; less (3) 10 percent holdback and less prior payments. . . .

What effect does this absence of a written covenant between HUD and O-D-M have on the responsibility of HUD to O-D-M for the money paid for inspection? What effect does the CONSTRUCTION CONTRACT - COST PLUS have on the construction and interpretation of this unwritten understanding?

It is submitted that the written contract between HUD and O-D-M is silent as to the responsibility and duty of HUD to O-D-M in the making of inspection of construction.

It is submitted that the written contract between HUD and O-D-M is silent as to the responsibility and duty of O-D-M to HUD to make payment for HUD's inspection of construction.

It is submitted that there is an understanding between HUD and O-D-M as to their respective rights and liabilities with respect to performance of inspection and payment. Our task is to discover by contractual interpretation based on the reorganized rules of construction of contracts what is the understanding to be enforced.

The silence of the contractual relationship in any document executed by HUD and O-D-M creates an obvious ambiguity. One reasonable

interpretation of this ambiguity is that HUD performed the inspections for its benefit and protection and for the benefit and protection of O-D-M.

Money was paid for the inspection service by O-D-M and the HUD supplied and completed form, CONSTRUCTION CONTRACT - COST PLUS, gives from the construction contractor the authority to HUD to protect and benefit those who will benefit by proper construction. Namely; HUD, the lender, the future tenants and O-D-M.

There is no expressed or implied limitation in any of the documents signed by HUD and O-D-M that in any way diminishes the

benefit and protection to O-D-M of the HUD inspection of construction.

Since HUD is the document creator and preparer, ambiguity must be construed against HUD and in favor of O-D-M.

In opposition to this contract construction, HUD offers the language of an agreement between HUD and Mellon Bank. This is an agreement to which O-D-M is not a party. HUD offers from the agreement with Mellon Bank the following language to limit its responsibility to O-D-M:

"5(b) during the course of construction, the commissioner and his representatives shall at all times have access to the property and the right to inspect the progress of construction, and an inspection fee in the amount of \$13,670.00 shall be paid upon the initial insurance

endorsement of the mortgage note. The inspection of construction by a representative of the commissioner shall be only for the benefit and protection of the secretary of Housing and Urban Development". (emphasis added)

This offered limitation on O-D-M's contractual rights against HUD is, for lack of a better designation, called by us a "third party detriment contract".

The lower court used the language in this "third party detriment contract" to rule in favor of HUD and dismiss O-D-M's claim in the summary judgment proceeding brought by HUD.

It was expected by conventional rules for the construction of contracts the court



below would find that a motion for summary judgment in favor of HUD was to be denied. It was expected that unquestionably HUD would have to prove something in addition to what it had asserted to prevail at trial.

We can only speculate what may have influenced the court to ignore the rules of contract construction to find in favor of HUD. Our rationalization for the finding of the lower court comes from the "slip" in the opinion, almost Freudian in nature. At page 7 of its opinion, the court discusses a paper of agreement called "Regulatory Agreement". This actually is no more than a contract containing contractual conditions



and words of agreement. However, the court speaks of these conditions as regulations. These conditions are not to be found in the Code of Federal Regulations.

We suggest that the lower court in reaching its decision has found a new public policy as the foundation upon which its reasoning rests. This policy can be stated that HUD is to be judged as if it were a regulatory agency. Even with respect to its own contracts the interpretation by HUD will be supported if the interpretation is reasonable and not arbitrary or capricious.

There is no need to point out the enormity of effect on numerous citizens such a public policy of

ignoring contract law or any part of the law because HUD is a party. We sincerely believe our analysis of the lower court's decision is correct. We sincerely believe this is a good time and adequate vehicle to restrain unnecessary and, therefore, unhealthy obeisance to HUD or any other Department or Bureau.

It is the appropriate time to stop a nascent public policy of ignoring recognized law and favoring the government over its citizens.

This Court should take the opportunity to rule on whether it is proper policy for HUD to be treated as a regulatory agency so that it may freely interpret its own contracts.

### Lower Court Jurisdiction

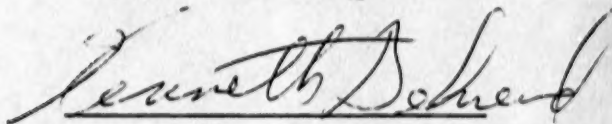
The jurisdiction of the Court of Claims was involved under 28 U.S.C.A. 1491, as to a claim against the United States founded upon an expressed or implied contract with the United States.

Petitioner's Arguement for  
Allowance of the Writ

HUD is not a regulatory agency.  
A hearing of the case will give Your  
Honorable Court the opportunity to  
characterize HUD's regulatory status.  
It will also deter agencies of the  
Executive branch and creations of the  
Legislature from encroachments on the  
law. It will encourage respect and  
observance of our law.

For these reasons, the Petition  
for Writ of Certiorari should be granded.

Respectfully submitted,  
BEHREND ARONSON & MORROW

A handwritten signature in dark ink, appearing to read "Kenneth W. Behrend", written over a horizontal line.

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